IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.427 OF 2003
AND
MISC. CIVIL APPLICATION NO.555/2003

Shri Muljibhai Ladharam Patel,
Laxmi Vijay Saw Mill,
Ponda Margao Road,
Dhavalimola, Ponda, Goa. ..... Petitioner.

V/s.

1. Smt. Maria F. Souza Aguiar,
House No.955/47, Alto Torda,
Alto Porvorim, Bardez, Goa.

2. Shri Ramjibhai L. Patel,
earlier residing at Dhavalimola,
Ponda, Goa and now permanently
residing at Gayatka Hardwares
Dipti Road, Bhadravati-577 301,
Karantaka. ..... Respondents.

Mr. U.S. Kolwalkar, Advocate for the petitioner.

Mr. V.K. Bodke, Advocate for respondent No.1.

CORAM : A.M. KHANWILKAR, J.

DATE : NOVEMBER 14, 2003.

ORAL JUDGMENT :

This writ petition under Article 227 of the Constitution of India takes exception to the Order passed by the Civil Judge, Sr. Division, Ponda dated 30.6.2003 in Execution Application No.17/2002/A.

2. Briefly stated, the respondent No.1 filed eviction proceedings against the petitioner and

respondent No.2. The petitioner was defendant No.2 in the said eviction proceedings being Regular Civil Suit No.63/93, filed before the Court of the Civil Judge, Sr. Division, Ponda. During the pendency of the said suit, order came to be passed by the trial Court, striking of the defence of the petitioner on the grounds stated therein. That order was made subject-matter of challenge right upto the Apex Court being S.L.P.(Civil) No.13945/1995. However, the same was confirmed. In other words, the defence of the petitioner was struck of by the trial Court. Later on the trial Court proceeded to frame issues. Even the order framing issues was unsuccessfully challenged by the petitioner right upto this Court. Thereafter, the trial Court proceeded with the suit and eventually decree for possession and arrears as well as mesne profits was passed in favour of the respondent No.1 and against the defendants, vide order dated 25.7.1997. The said Judgment and Decree was questioned by the petitioner by way of an appeal, which was, however, dismissed by the appellate Court on 7.12.2001. The petitioner then carried the matter before this Court by way of Second Appeal, which was also dismissed on 13.6.2002. In other words, the Judgment and Decree as passed against the petitioner and in favour of the respondent No.1, came to be confirmed right upto this Court. Only thereafter, the respondent No.1 instituted

the present application for execution of the said Judgment and Decree. Even this application was resisted by the petitioner essentially on the ground that the Judgment and Decree as passed by the Civil Court is a nullity because the parties were governed by the Portuguese Decree No.43.525; whereas the Decree was passed under the provisions of the Transfer of Property Act. The executing Court rejected that contention by the impugned Order dated 30.6.2003. The executing Court has noted that it has come on record that no such plea was raised by the petitioner in the written statement filed during the course of the trial; whereas that plea was raised for the first time only in execution proceedings. It has further found that the executing Court cannot go behind the Decree and it was not open for it to consider the appropriateness of the Decree on the ground that it is incorrect in law or fact. The executing Court further found that the point of jurisdiction of the civil court was specifically framed by the trial Court and the same has been answered against the petitioner. It has also noted that the jurisdiction of the Civil Court on the ground that the parties were governed by the Portuguese Decree No.43.525, was never pressed into service although the issue of jurisdiction was specifically raised and decided either before the trial Court or in the two subsequent appeals filed by the petitioner herein. The

executing Court has distinguished the decision relied upon by the petitioner in the case of Gangadhar Narsingdas Agrawal v/s. Alina D'Costa e Pinto and ors., reported in 1989 (2) Goa Law Times 118 as being inapplicable to the facts and circumstances of the present case. The executing Court then proceeded to rely upon the reported decision of this Court in the case of Dhanaraji Baburam Yadav & Anr. v/s. Ramakant K. Dhanawade & Ors., reported in 2003(2) ALL MR 425. On the above reasonings, the executing Court rejected the objection taken on behalf of the petitioner and instead directed the petitioner to hand over possession of the suit land to the respondent No.1/Decree Holder within 60 days failing which the Decree-holder will be at liberty to get the decree executed through the Court and the costs shall be recovered from the petitioner.

3. Against the abovesaid decision, the present writ petition has been filed before this Court by the petitioner. The same came to be admitted on 28.8.2003, albeit ex-parte. On that day, this Court also granted ad interim relief in favour of the petitioner. Rule of this writ petition was served on the respondent No.1 on 16.9.2003. Immediately, thereafter, the respondent No.1 rushed to this Court and filed Misc. Civil Application No.555/2003 before this Court on 30.9.2003 for vacating the ex-parte ad

interim order as well as the order granting rule and to dismiss the writ petition filed by the petitioner with exemplary costs being abuse of process of the Court. In this application, respondent No.1 has asserted that the petitioner has suppressed the material fact that the Portuguese Decree No.43.525 stood repealed in view of the provisions of Goa Rent Act, in particular Section 59, with effect from 2.10.1969. It is further asserted that the reliance placed by the petitioner on the decision in Gangadhar Narsingdas Agrawal v/s. Alina D'Costa e Pinto & ors. (supra), is wholly inappropriate-because the sole question that was considered in that case was whether the parties were governed by the provisions of the Portuguese Decree or the provisions of the Transfer of Property Act and in that case the lease was executed much before coming into force of the said Act. It is also contended that assuming that the Portuguese Decree was applicable to the facts and circumstances of the present case, even then Section 88 of the said Decree would enable the Civil Court to try and decide the suit between the parties for the nature of reliefs claimed by respondent No.1. It is contended that in fact, issue of jurisdiction was specifically framed in the suit by the trial Court and that has been tried and decided against the petitioner not only by the trial Court, but also at the two appeal stages; and the contention now raised

that the jurisdiction of the Civil Court was ousted because the parties were governed by the Portuguese Decree, was never pressed into service. It is contended that the plea now taken is not available to the petitioner on the principle of constructive res judicata or principle analogous thereto. It is, therefore, contended that taking any view of the matter, there is absolutely no substance in the objection raised on behalf of the petitioner so as to interdict the execution of the decree passed against him. According to respondent No.1, in view of the conduct of the petitioner, which is obviously to protract the proceedings at every level so as to deny the respondent No.1 of the fruits of the decree, this Court, should be slow in interfering in its writ jurisdiction, which is undoubtedly discretionary in nature. On the above contentions, it is prayed in the Misc. Civil Application No.555/2003 moved by the respondent No.1, that the ex-parte ad interim order be vacated and the writ petition be dismissed with exemplary costs being abuse of process of Court.

4. The above said Misc. Application was posted for hearing before me on 7.11.2003. As the contentions which were raised in the said application were overlapping with the issues involved in the writ petition pending before this Court, it was suggested to

the Counsel appearing for the parties that instead of deciding the Misc. Application, the main matter can be heard and disposed of finally. Both the Counsel fairly accepted that suggestion and proceeded to argue the writ petition finally, forthwith. The matter was accordingly heard for sometime on 7.11.2003 and remained part-heard which hearing continued on 13.11.2003. Both the Counsel were heard at length and with their assistance, I have perused the relevant documents.

5. The only argument canvassed on behalf of the petitioner before this Court is that the subject Decree is a nullity because the parties were governed by the provisions of Portuguese Decree No.43.525; whereas the Decree has been passed under the provisions of the Transfer of Property Act. It is contended that the tenor of the Judgments rendered by the Courts below would clearly indicate that the decree was passed under the provisions of the Transfer of Property Act as such. The learned Counsel has placed reliance on the decision of the single Judge of this Court reported in 1989 (2) G.L.T. 122 to contend that the lease in respect of the open plot, such as in the present case, executed on 15.10.1972 by a written lease, will be governed only by the provisions of the Portuguese Decree and not by the provisions of the Transfer of Property Act. It is

contended that this view has been affirmed by the Division Bench of this Court in the case of Gangadhar Narsingdas Agrawal v/s. Alina D'Costa e Pinto & Ors. (supra). On this premise, it is argued that, the Decree as passed is a nullity and since it is a nullity, its validity can be set up at any stage or even in any collateral proceedings, as is well settled. Reliance has been placed on the decision of the Apex Court in Kiran Singh and ors. v. Chaman Paswan and ors., reported in AIR 1954 SC 340 to buttress this contention. It was also argued that the executing Court has committed manifest error in referring to the written statement as was tendered by the petitioner during the course of the trial-because that written statement cannot be said to be on record having regard to the order of striking of the defence of the petitioner which was affirmed till the Apex Court. It is argued that, therefore, it was inappropriate for the executing Court to hold that the petitioner was not entitled to press the above argument to contend that the subject-decree is nullity for, it overlooks that the defence of the petitioner was struck of. These are the only points canvassed before me in the present writ petition on behalf of the petitioner.

6. Having considered the rival submissions, there can be no dispute with the proposition canvassed

on behalf of the Petitioner that, it is well established that if a decree passed by the Court without jurisdiction is a nullity than its invalidity can be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. Counsel for the petitioner has rightly placed reliance on the decision of the Apex Court in Kiran Singh and ors. v. Chaman Paswan and ors (supra) to buttress the above proposition. However, in the same Judgment, the Apex Court went on to observe as follows :

> " A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."

From the above observations, it is clear that if the issue is one of pecuniary or territorial jurisdiction, or is in respect of the subject-matter of the action, then the Decree cannot be executed, being a nullity. However, in the present case, the Decree is not questioned on the ground of pecuniary or territorial jurisdiction as such. At best, what is contended before me is that the Decree is a nullity on account of lack of jurisdiction of the subject-matter of the action for, the suit instituted by the respondent No.1

contained reliefs which were ascribable to the provisions of the Portuguese Decree by which the parties were governed. Assuming that this argument is available to the petitioner, the core question that will have to be addressed is; whether the Civil Court, namely, the Civil Judge, Sr. Division, Ponda, before whom the subject suit was instituted and has been finally decided, can be said to be incompetent to decide the action between the parties ? In the first place, from the plain reading of the plaint, as filed, it is not possible to even suggest that the respondent No.1 had claimed the reliefs stated therein only with reference to the provisions of the Transfer of Property Act as such. Indeed, the trial Court as well as in the two appeals filed before the appellate Courts, the contention regarding the appropriateness of the action in the context of the provisions of the Transfer of Property Act has been examined, as can be discerned from these Judgments. However, to my mind, the discussion in those Judgments is recorded in the context of the argument canvassed on behalf of the petitioner that the suit as filed by respondent No.1 was incompetent on account of non-compliance of the mandatory provisions of the Transfer of Property Act. As the petitioner had raised that plea, the respondent No.1 was required to controvert the same and for which reason the Courts were required to deal in those

Judgments. That does not mean that the said suit was filed only under the provisions of the Transfer of Property Act as such. On the other hand, the relief claimed in the suit was one of possession of the suit property and mesne profits. The next question is; whether the Civil Court could or could not have entertained the said suit even if we were to hold that the reliefs stated therein were referable to the provisions of the Portuguese Decree No.45.525 ? To my mind, the learned Counsel for the respondent No.1 has rightly relied on Section 88 of the Portuguese Decree which enables the Civil Judge, Sr. Division, Ponda to try, entertain and decide even such a suit. No express provision from the Portuguese Decree has been brought to my notice to demonstrate that the jurisdiction of the Civil Judge, Sr. Division, Ponda was unavailable at all to try, entertain and decide the said action as instituted by respondent No.1 for the stated reliefs. A priori, it is not possible to take the view from the face of the record that the Civil Judge, Sr. Division, Ponda lacked inherent jurisdiction to try, entertain and decide the suit as filed before him. Be that as it may, indisputably, the issue of jurisdiction was specifically framed by the trial Court (i.e. issue No.15) and that issue has been answered against the petitioner. No doubt that issue has been examined only in the context of the provisions of the Goa Rent Act.

But that was the only argument canvassed on behalf of the Petitioner before the Court below during the trial. Even in the subsequent two successive appeals filed by the petitioner, at no stage did the petitioner contend that the Civil Court had no jurisdiction to try the suit as filed, on account of the provisions of the Portuguese Decree. This position cannot be disputed at all. In such a situation, to my mind, the question of the decree as passed by the Civil Judge, Sr. Division, Ponda and confirmed by two appellate Courts cannot be labelled as nullity by any standards. In my opinion, the Counsel for the respondent No.1 has rightly placed reliance on the decision of the Apex Court in the case of Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman and ors., reported in AIR 1970 SC 1475, in particular, paragraphs 6 and 7 thereof, which read thus :

> " 6. A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.
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> 7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for

> execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record; where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. ....." (emphasis supplied).

7. The learned Counsel for the respondent No.1 has also rightly placed reliance on the decision of the Apex Court in the case of P.K. Vijayan v. Kamalakshi Amma and ors. reported in AIR 1994 SC 2145, in particular, paragraphs 10 and 11 thereof, and more importantly the decision in the case of Urban Improvement Trust, Jodhpur v/s. Gokul Narain (Dead) by Lrs. and anr., reported in (1996) 4 SCC 178, in particular, paragraphs 15 and 16, which read, as under:

> " 15. .... If the court has jurisdiction but there is any defect in its exercise of jurisdiction it does not go to the root of its authority. Such a defect like territorial jurisdiction could be waived by the party which could be corrected only by way of an appeal or revision. ...
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> 16. ... As regards the nullity or lack of inherent jurisdiction, this Court observed that the decree can be said to be a nullity if it is passed by a court

> having no inherent jurisdiction. Erroneous decree cannot be said to be a nullity; nor can a decree based on an error be a nullity. Nullity has to be understood in the sense that it is ultra vires the power of the court passing the decree and not merely avoidable decree. As stated earlier, if the decree strikes at the jurisdiction of the court or the court lacks jurisdiction it strikes at the very root of the authority to pass the order of the decree. ..." (emphasis supplied).

8. Applying the dictum of the Apex Court in the aforesaid decisions relied upon by respondent No.1, it is not possible to countenance the objection raised on behalf of the petitioner, for the Decree passed by the learned Civil Judge, Sr. Division, Ponda is not a nullity as such. If that objection is to be negatived, it necessarily follows that the executing Court will be bound by that decree and it is not open for the executing Court to go behind the decree. Understood thus, this writ petition should fail. While parting I may, however, record that although several other contentions were raised before me by the Counsel for the respondent No.1, to my mind, it is unnecessary to dwell upon those contentions because the core issue will have to be answered against the petitioner on the reasons already recorded above.

9. Accordingly, this petition deserves to be dismissed with exemplary costs having regard to the

facts and circumstances of the case, which is quantified at Rs.7500/- to be made over to the Respondent No.1. The petitioner shall pay/deposit the costs quantified at Rs.7500/- within two weeks from today, which shall be made over to the Respondent No.1 forthwith. In view of the above, the accompanying Misc. Civil Application No.555/2003 is also disposed of.

10. Certified copy expedited.

A.M. KHANWILKAR, J.

ssm.